NO. 21047

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., et al.,

Appellees.

APPELLEES' BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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JURISDICTION

Appellant brought this action in the United States District Court for the Southern District of California (now the Central District of California), seeking reinstatement to the Civil Service position from which he was removed and back pay. The District Court had jurisdiction under 28 U.S.C. §§ 1361 and 1651, but, insofar as the recovery of back pay was concerned, that jurisdiction was limited to $10,000 by 28 U.S.C. § 1346(a)(2). The District Court granted the government's motion for summary judgment on the grounds of laches. The jurisdiction of this Court is based on 28 U.S.C. § 1291.

STATEMENT OF THE CASE

In March, 1962, the appellant was removed from his job as a mechanic in the National Aeronautics and Space Administration, Flight Research Center, Edwards Air Force Base, California, on charges of deficiency in performance of duties, actions causing or tending to cause damage to federal property, actions endangering the safety of others, and negligence. After the removal was reviewed by the Board of Appeals and Review, the dismissal was upheld and the appellant was notified by letter dated October 1, 1962 [Tr. p. 44].

This action was filed by the appellant on August 13, 1965 [Tr. p. 2]. The appellees filed their motion for summary judgment on November 5, 1965, asserting entitlement to summary judgment on ground of laches and on the grounds that the administrative proceedings were in substantial compliance with the administrative regulations governing such dismissals [Tr. pp. 54-64].

In granting summary judgment, the District Court held that the thirty-four month delay between final removal and the filing of a lawsuit to review that removal constituted laches [Tr. pp. 183, 184]. In reaching its decision, the court below considered the Affidavit which had been filed by the appellant and made Findings of Fact, and Conclusions of Law which reflect that consideration [Tr. pp. 185, 186].

REGULATIONS INVOLVED

The pertinent portions of the regulations governing removal are as follows:

Title 5 -- Code of Federal Regulations -

"§ 752.104 General standards.

"(a) An agency may not take an adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service.

". . . ."

"§ 772.305 Hearings.

"(a) Coverage. This section applies only to appeals under Subpart B of Part 752 of this chapter.

"(b) Right to a hearing. An appellant is entitled to a hearing before the office of the Commission having initial jurisdiction of the appeal. That office shall inform the appellant of his right to a hearing. If the appellant does not desire a hearing, he shall so advise that office in writing.

"(c) Hearing procedures. (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency is also entitled to participate

in the hearing. Both parties are entitled to produce witnesses but as the Commission is not authorized to subpena witnesses the parties are required to make their own arrangements for the appearance of witnesses.

". . . ."

"§ 772.307 Further appeal to the Board of Appeals and Review.

"(a) Right of further appeal. Both parties are entitled to appeal the decision on the initial appeal issued under § 772.306 to the Board of Appeals and Review, U.S. Civil Service Commission, Washington 25, D. C. An appeal to the Board of Appeals and Review shall be in writing, set forth the reasons for the appeal, and be filed with the Board within 7 days after receipt of the decision on the initial appeal. The Board may extend the time limit in this paragraph when a party shows that circumstances beyond the control of the party prevented the filing of the appeal within the time limit.

". . . ."

ISSUES PRESENTED

I

What is the scope of review of the trial court's holding that appellant is barred by laches?

II

Does the doctrine of laches bar the appellant from seeking judicial review of his removal?

III

Are there independent grounds upon which the judgment of the trial court can be sustained?

SUMMARY OF ARGUMENT

I

Review of the trial court's application of the doctrine of laches is limited to determining whether there was an abuse of discretion.

II

Even if this Court were to review the application of the doctrine of laches on its merits, the trial court's judgment must be sustained.

III

It is a familiar concept that on review a judgment will be affirmed even if the judgment is given for the wrong reasons. Therefore, the judgment of the trial court in this case should be

affirmed, absent any consideration of the doctrine of laches, because the appellees are entitled to judgment against the appellant based on their motion for summary judgment, on the grounds that the administrative proceedings had prior to the removal of the appellant did not violate any of his constitutional rights and were in substantial compliance with the administrative regulations and proceedings governing dismissals. A partial record of the administrative proceedings is before this Court as Exhibits "A" through "L" of the plaintiff's Complaint [Tr. pp. 10-45].

ARGUMENT

I

REVIEW OF THE TRIAL COURT'S APPLICATION OF THE DOCTRINE OF LACHES IS LIMITED TO DETERMINING WHETHER THERE WAS AN ABUSE OF DISCRETION.

The appellees take the position that the application of the doctrine of laches by the trial court was within its sound discretion. The case of Laursen v. O'Brien, 90 F. 2d 792, 795 (C. A. 7, 1937), cites 5 C. J. S. Appeal and Review § 1583 in support of this proposition. Since discretion of the trial court is involved, review by this Court should be limited to a decision that the trial court did not abuse its discretion.

The law governing the review of matters within the discretion of the trial court has been stated as follows:

". . . .

"[6] The courts have frequently declared that there is no artificial rule as to the lapse of time will justify the application of the doctrine of laches. Each case must be determined upon the basis of its facts, and in the absence of a palpable abuse of discretion the trial court's finding upon the issue will not be disturbed upon appeal. Hunt v. L. M. Field, Inc., 202 Cal. 701, 705, 262 P. 730; McDevitt v. Butte City Ranch, 7 Cal. App. 2d 252, 254, 46 P. 2d 290."

Williams v. Marshall, 235 P. 2d 372, 378 (Cal. 1951).

This rule was followed, and quoted, in the more recent case of Philbrook v. Howard, 320 P. 2d 609 (Cal. 1958). It cannot be said that the trial court abused its discretion in applying the doctrine of laches to bar the appellant.

II

EVEN IF THIS COURT WERE TO REVIEW THE APPLICATION OF THE DOCTRINE OF LACHES ON ITS MERITS, THE TRIAL COURT'S JUDGMENT MUST BE SUSTAINED.

The appellees have cited numerous cases in their Memorandum of Points and Authorities filed in support of the motion for summary judgment [Tr. pp. 57-61], and will not repeat them all here. In discussing the applicability of laches, the appellant pointed

out that the doctrine has two parts. To be barred, the record must show that the plaintiff waited an unreasonable length of time before bringing his action and the record must show that there has been prejudice to the defendant. The appellant, on page 7 of his Opening Brief, seeks to meet the issue of prejudice to the government. He speaks of a conscious waiver of back wages to reduce the amount of prejudice to the appellees. Even if this statement were true, and the record indicates that the waiver was unconscious since the Complaint sought restoration of his former position with back pay [Tr. p. 8] and the question of waiver did not arise until the appellees pointed out in their memorandum in support of their motion for summary judgment that the jurisdiction of the District Court was limited to $10,000 [Tr. p. 57], the prejudice to the appellees still exists. There is at least $10,000 worth of prejudice, besides the prejudice caused by the inevitable disbursement of government personnel during the three year time lag between the removal and the institution of this action.

Two of the cases which we cited in support of our motion for summary judgment are particularly applicable to this case. The language used by the court in the case of Jones v. Summerfield, 265 F. 2d 124 (C. A. D. C. 1959) shows that the facts of that case were markedly similar to the facts of this case.

> ". . . .
>
> "We think that plaintiff-appellant is barred by laches. His suit was not brought in a proper forum until thirty-three months elapsed after his discharge,

and some seventeen months after the decision in Cole v. Young. The letters to various administrative officials do not excuse his delay in bringing suit. United States ex rel. Arant v. Lane, 1919, 249 U.S. 367, 39 S. Ct. 293, 63 L. Ed. 650; Grasse v. Snyder, 1951, 89 U.S. App. D.C. 352, 192 F.2d 35; Bailey v. United States, 1959, Ct. Cl., 171 F. Supp. 281.

". . . ."

Jones v. Summerfield, supra, p. 125.

The case of Chappelle v. Sharp, 301 F.2d 507 (C.A. D.C. 1961), also seems to be quite close factually to the present case. In that case it appeared that the Civil Service Commission raised the issue of laches by factual allegations in an affidavit supporting its motion to dismiss. In this case, the problem of laches was raised directly in the memorandum supporting the motion for summary judgment [Tr. pp. 61-62]. In the Chappelle case, the appellant delayed thirty-four and one-half months after final removal before filing his lawsuit. The trial court entered summary judgment and the District of Columbia Circuit Court held that:

". . . .

"The plaintiff's case was barred by laches. The law on the point was established by United States ex rel. Arant v. Lane in 1919 and has consistently been applied by the federal courts in many cases since then. The judgment of the District Court is

Affirmed."

Chappelle v. Sharp, supra, p. 507.

There is no distinction between this case and the Chappelle v. Sharp case, supra, and the Jones v. Summerfield, case, supra. On the strength of these authorities, the granting of summary judgment by the trial court was a correct decision.

III

IT IS A FAMILIAR CONCEPT THAT ON REVIEW A JUDGMENT WILL BE AFFIRMED EVEN IF THE JUDGMENT IS GIVEN FOR THE WRONG REASONS. THEREFORE, THE JUDGMENT OF THE TRIAL COURT IN THIS CASE SHOULD BE AFFIRMED, ABSENT ANY CONSIDERATION OF THE DOCTRINE OF LACHES, BECAUSE THE APPELLEES ARE ENTITLED TO JUDGMENT AGAINST THE APPELLANT BASED ON THEIR MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE ADMINISTRATIVE PROCEEDINGS HAD PRIOR TO THE REMOVAL OF THE APPELLANT DID NOT VIOLATE ANY CONSTITUTIONAL RIGHTS AND WERE IN SUBSTANTIAL COMPLIANCE WITH THE ADMINISTRATIVE REGULATIONS AND PROCEEDINGS GOVERNING DISMISSALS. THE RECORD OF THE ADMINISTRATIVE PROCEEDINGS IS BEFORE THIS COURT AS EXHIBITS "A" THROUGH "L" OF THE PLAINTIFF'S COMPLAINT [TR. pp. 10-45].

The appellees' motion for summary judgment was based on the alternative grounds that the appellant was barred by his laches and that a review of the administrative record would show that the procedures followed were correct and that his removal by the Civil Service Commission was not arbitrary or capricious. This second

ground was argued to the trial court and considered by it. However, by an order entered after oral argument, the trial court determined to base its decision for summary judgment solely on the ground of laches [Tr. pp. 183-184]. It is a well settled doctrine that, should this Court have any concern about the applicability of laches, the judgment below should be affirmed where there is an independent basis for affirmation. In Helvering v. Gowran, 302 U.S. 238 (1937), the court put the rule in this language.

> ". . . .
>
> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. . . ."
>
> Helvering v. Gowran, supra, p. 245.

That rule has found more recent expression in the case of Brown v. Allen, 344 U.S. 443, 459 (1952).

It is therefore appropriate to reconsider the appellees' arguments in support of their motion for summary judgment as they relate to the review of the administrative record. This argument is found on pages 57 through 61 of the transcript. The administrative review of a removal is provided for in 5 C.F.R. § 772.307. Judicial review is in the nature of mandamus under 28 U.S.C. § 1361.

Title 5 C.F.R. § 752.104 provides, pursuant to the Veterans Preference Act (5 U.S.C. § 863), that the appellant was entitled to certain procedural safeguards and could have been removed

from his Civil Service job only for such cause as would promote the efficiency of the service. We cited [Tr. p. 57] a number of cases where the phrase "such cause as will promote the efficiency of the service" was considered. In support of the motion for summary judgment, the appellees argued that the scope of review of an administrative discharge is narrow. The reviewing court will only determine whether or not the actions of the removing agency were arbitrary or capricious or whether they departed from the required standards of procedural due process. See Ellis v. Mueller, 280 F. 2d 722 (C. A. D. C. 1960), cert. den., 364 U. S. 883, and the other authorities cited at page 4 of the appellees' Memorandum of Points and Authorities, page 58 of the transcript.

It would be unnecessarily repetitious to reargue all of the points made in our memorandum in support of the motion for summary judgment. It is sufficient, we feel, to restate our conclusion that the National Aeronautics and Space Administration and the Civil Service Commission were not required to produce the witnesses requested by the appellant. The record before the District Court showed that the appellant had not discharged the initial burden of attempting to secure the attendance of the witnesses himself. The case of McTiernan v. Day, 225 F. Supp. 720 (D. C. E. D. N. Y. 1964), affirmed 337 F. 2d 31 (C. A. 2, 1964), requires a showing by the appellant that he made positive efforts to obtain the attendance of the witnesses which he sought.

There is no merit in the appellant's claim of Fifth and Sixth Amendment violations. These suggestions were answered on

pages 6 and 7 of the memorandum in support of summary judgment, pages 60 and 61 of the transcript, and have not been supported at all by the appellant. It is clear from a review of the transcript that the appellant was afforded the full protection of his rights in the administrative proceedings which resulted in his removal. For this reason, and independently of a consideration of the doctrine of laches, the judgment of the trial court was the correct one and it should be affirmed.

SUMMARY

The trial court granted the appellees' motion for summary judgment. The order granting summary judgment was based on the grounds that the appellant was barred by his laches in waiting 34 months after final removal until the filing of a lawsuit to review that removal. It is the appellees' position that application of the doctrine of laches is a matter within the sound discretion of the trial court and should not be disturbed in the absence of a showing of abuse. There is no such showing by the appellant. The record and the comparable reported cases show that the doctrine was correctly applied in this case. The appellant's delay was unreasonable and it prejudiced the appellees, at the least to the extent of $10,000.

Aside from the doctrine of laches, there is an independent basis on which the judgment below is correct. Within the legitimate

scope of review of the administrative proceedings, the court below could only have concluded that there was no denial of due process and that the removal action was not arbitrary and capricious. Because the judgment affirming the appellant's removal was correct, it must be affirmed whether on the grounds of laches or otherwise.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Larry L. Dier

LARRY L. DIER,
Assistant U. S. Attorney